In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 263

BRISTOL-MYERS COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. In 1964 the Federal Trade Commission commenced a general, industry-wide investigation of alleged unfair and deceptive practices in the advertising of non-prescription, systemic analgesic drugs (App. 84-85).[1] The widespread prevalence of ques-

[1] These are preparations (*e.g.*, aspirin) sold without a prescription which act throughout the bodily system to reduce pain without a reduction in consciousness. "App." references herein are to the appendix to the briefs in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

tionable analgesic advertising practices revealed by the investigation led the Commission to withdraw complaints issued against petitioner and several other drug manufacturers, and, instead, to commence a rulemaking proceeding seeking to determine whether the Commission should adopt a proposed trade regulation rule which would declare, on an industry-wide basis, certain analgesic advertising practices to be unfair and deceptive acts in violation of Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. 45, 52) (App. 29-32, 88).[2] Accordingly, the Commission published in the Federal Register (32 Fed. Reg. 9843) a notice of proposed rulemaking which invited all interested persons, including analgesic manufacturers and the consuming public, to express their views concerning the subject matter of the proceeding.[3] In addition, the Commission, pursuant to its long-established practice, issued a news

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[2] For example, the proposed trade regulation rule would declare that it is unfair and deceptive to make advertising representations regarding the safety or efficacy of analgesics which contradict or exceed the representations on the labels (App. 30).

[3] Since at least 1920, the Commission has interpreted the Act to authorize it to conduct rulemaking proceedings designed to prevent unlawful practices on an industry-wide basis. See 29 Fed. Reg. 8370. The Commission's general rules of procedure for the promulgation of "trade regulation rules" were established in 1962 (27 Fed. Reg. 4609, 4611-4612; 16 C.F.R. 1.12). See 1 Davis, *Administrative Law Treatise*, § 5.04, p. 126 (1965 Pocket Part) (approving the Commission's analysis of its rulemaking authority as "scholarly", "persuasive" and "built soundly at every step of its inexorable logic").

release which factually and accurately summarized the contents of the published notice (App. 92-101, 102-104). Neither the Commission's notice nor its news release mentioned any specific analgesic or analgesic manufacturer.[4] The Commission subsequently received numerous comments from interested persons, pursuant to its published notice, and made much of this information public (App. 60). It also announced that it would conduct public hearings in the rulemaking proceeding, in which all interested persons could present pertinent views, data or arguments (App. 60-61).

Subsequently, petitioner, an analgesic manufacturer, demanded that the Commission permit it to engage in extensive "discovery" in the pending rulemaking proceeding. Petitioner sought, *inter alia*, to take the depositions of 44 authors of scientific papers which had been placed by the Commission in the public record of the rulemaking proceeding. Petitioner's demands also encompassed confidential documents submitted by its competitors in compliance with the Commission's requests during its industry-wide investigation (App. 33-37, 41-48).[5] The Commission denied petitioner's discovery demands as unwarranted (App. 38-40, 91-92). Petitioner thereafter brought

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[4] There are in the United States over fifty manufacturers or marketers of over 500 analgesics whose total annual sales exceed $400 million and whose total annual advertising expenditures for such products exceed $90 million (App. 59).

[5] However, petitioner requested "confidential" treatment for similar documents which the Commission had required it to submit (App. 39-40).

this action in the district court to enjoin the Commission from promulgating the proposed trade regulation rule on the ground that the Commission lacks statutory authority to promulgate any trade regulation rule, and that if such a rule were adopted and applied against it, petitioner would be deprived of various procedural rights of both constitutional and statutory origin (App. 20, 22-23). Petitioner also sought to enjoin the Commission's rulemaking proceeding until after the granting of its discovery demands (App. 16). In addition, petitioner sought to enjoin the Commission from "making known to the public in any manner any further steps, procedures or actions which the Commission takes with respect to its proposed Trade Regulation Rule or any promulgation thereof" (App. 19). Finally, petitioner demanded, pursuant to the Freedom of Information Act (5 U.S.C. (Supp. V) 552), "any and all information" which might pertain to the Commission's rulemaking proceeding (App. 15).

The district court dismissed all of petitioner's claims, holding that its attempt to enjoin the Commission's rulemaking proceeding was premature, and that there was no merit in petitioner's other claims (Pet. App. 1a-6a). The court of appeals concluded that petitioner's Freedom of Information Act contention should be further explored by the district court, but it unanimously affirmed the district court's dismissal of petitioner's other claims (Pet. App. 9a-15a). Chief Judge Bazelon's opinion stated that petitioner had not demonstrated that any "irreparable injury" might result from the Commission's rule-

making proceeding and that petitioner's claim for permanent injunctive relief was "not ripe for adjudication" since "[t]he Commission has merely proposed a rule, which may never be adopted or enforced. The rule-making authority of an agency cannot usually be fairly tested in the absence of a specific legal or factual setting" (Pet. App. 14a). The court of appeals also concluded that the Commission's news release concerning the rulemaking proceeding was "within the contemplation of" the Federal Trade Commission Act and would have only a "diffuse" impact on the analgesic industry (Pet. App. 15a).

2. The courts below were plainly correct in dismissing peptitioner's various claims.[6] As the court of appeals noted (Pet. App. 14a), petitioner's contention that the Commission's proposed trade regulation rule would be illegally adopted or applied is premature since there is no way of knowing whether such a rule will ever be promulgated, what its actual contents might eventually be, or whether the Commission might ever seek to apply it against petitioner. Thus, the legal issues which petitioner seeks to raise are not presently "fit * * * for judicial decision * * *"; nor can it be said that "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott*

[6] The petition for a writ of certiorari does not, of course, raise any question concerning the court of appeals' interlocutory ruling on petitioner's Freedom of Information Act claim; review of that aspect of the court of appeals' decision has not been sought by the Commission.

Laboratories v. *Gardner*, 387 U.S. 136, 148-149. Similarly premature is petitioner's attempt to review interlocutory orders of the Commission denying discovery in the pending rulemaking proceeding. See, *e.g.*, *Federal Power Commission* v. *Edison Co.*, 304 U.S. 375, 385. Finally, there is no merit in petitioner's attempt to enjoin the Commission from "making known to the public" the existence and nature of the ongoing rulemaking proceedings. In the exercise of its broad statutory responsibilities, the Commission may properly investigate the analgesic industry and invite public information and comment in assisting itself in performing its duty to interpret the Act and explore its rulemaking authority. It could not perform these and other vital functions directed toward effectuating the public interest if it were required, as petitioner would have it, to operate surreptitiously. See *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279; *Federal Trade Commission* v. *Cinderella Career and Fnishing Schools*, 404 F. 2d 1308 (C.A.D.C.).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.

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